United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1107

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 77-1107

UNITED STATES OF AMERICA,

Appellee,

-v.-

WILLIAM H. CLEARY and
GUSTAVO PASSARELLI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT WILLIAM H. CLEARY

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UNITED STATES COURT OF APPEALS
FILED
JUN 3 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
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-v.-

WILLIAM H. CLEARY and
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Defendants-Appellants.

BRIEF OF DEFENDANT-APPELLANT WILLIAM H. CLEARY

Issues Presented

1. Whether a bank officer who made a series of loans each within his discretion and each approved by his superior officer and none in violation of the written or oral rules of his Bank may be convicted of misapplication of bank funds where he did not receive any part of the loan proceeds.

2. Whether the Court erred in charging that to expose the Bank to loss was sufficient to establish an intent to injure or defraud the Bank where exposure to loss is intrinsic to the granting of any loan.

STATEMENT OF THE CASE

Preliminary Statement

William H. Cleary appeals from a judgment of conviction entered on February 24, 1977, in the United States District Court for the Southern District of New York following a seven-day trial before the Honorable Robert L. Carter, United States District Judge for the Southern District of New York, and a jury.

Indictment 76 Cr. 986, filed on October 27, 1976, charged Cleary, a bank officer for the Barclay's Bank of New York, Jerome F. Healy, an attorney who pled guilty and cooperated with the Government, and Gustavo Passarelli, a businessman and the other appellant herein with ten violations of 18 U.S.C. §656 (Theft, embezzlement, or misapplication by bank officer or employee) as follow:

COUNT	DATE	BORROWER	AMOUNT
2	9/26/75	Mary Roccario	$5,000.00
3	10/22/75	8626 Realty Corporation	$5,000.00
4	10/27/75	Westchester Avenue Marina, Inc.	$5.000.00
5	11/12/75	Carl French	$5,000.00
6*	11/13/75	Guiseppe (Joseph) Passarelli	$5,000.00
7*	11/25/75	Thomas Powers	$5,000.00
8*	12/15/75	Westchester Avenue Used Cars, Inc.	$5,000.00

* Cleary was convicted on the Counts marked with an asterisk.

COUNT	DATE	BORROWER	AMOUNT
13	10/9/75	Jerome Healy	$5,000.00
14*	12/9/75	Edward R. Hogan	$5,000.00
15	12/12/75	Margaret Fletcher	$5,000.00

Count 1* charged the three defendants with conspiracy to violate §656. The Indictment also charged that Cleary knowingly made false statements on the applications of Mary Roccario (Count 9), Carl French (Count 11), Thomas Powers (Count 12), and a fourth person Carmine Liberatore (Count 10) who was involved in the loan to 3626 Realty Corporation. Count 16 charged Cleary with making a false entry on bank records.

The jury was selected and sworn and the opening statements were made on January 10, 1977. Testimony was had on January 11 and 12, 1977. Cleary took the stand in his own defense on January 13 and 17, 1977. Passarelli took the stand in his own defense on January 17 and 18, 1977. Summations were had and the Court charged on January 18, 1977. The jury received the case at 4:50 P.M. and was excused for the evening at 6:40 P.M. on January 18, 1977. The jury deliberated from 10:30 A.M. to partial verdict at 5:55 P.M. January 19, 1977. The remainder of the verdict was received at 6:15 P.M. on that day.

---

* Cleary was convicted on the Counts marked with an asterisk.

Cleary was found guilty on Counts 1, 6, 7, 8 and 14; he was acquitted of the balance of the charges. Passarelli was found guilty of Counts 1, 3, 4, 5, 7, 8, 10 and 12. On February 24, 1977, Judge Carter sentenced Cleary to five years concurrently on Counts 1, 6, 7, 8 and 14; imposition of sentence was suspended and Cleary was placed on probation for five years. Cleary is currently serving his probation.

Statement of the Facts

Cleary was thirty years old at the time of the trial (Cleary Tr. 477).* He had been hired by Barclay's Bank of New York as a trainee in February 1975 (Ibid.). He was assigned to a New Rochelle branch of the Bank at 491 Main Street in May 1975 (Cleary Tr. 480). In July of 1975, he was named to the twin posts of public relations officer for the Bank and assistant manager of the branch (Cleary Tr. 482-3). In the five months between July and December when the ten loans at issue came into question, Cleary was in charge of a numbing series of tasks and events for the Bank. He was the contact person for Arnold Bakery Products, Inc. (Cleary Tr. 481); he was in charge of issuing press releases for the Bank (Cleary Tr. 483), of sending condolences to customers who became ill or passed away (Cleary Tr. 484), of the Bank effort

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* Parenthetical citations are to the page of the trial transcript and, where relevant, to the name of the witness testifying. The pages cited are included under their original pagination in the Cleary Appendix.

for the United Way (Ibid.), of the Bank savings bond drive (Ibid.), of the Bank's annual flower show (Cleary Tr. 485), of the Money Wheel program to increase savings deposits (Cleary Tr. 488), of Youth Day at the Bank (Cleary Tr. 491), and of the Bank cafeteria which served over 130 employees at the Bank (Cleary Tr. 492). He also made calls for the Bankamericard project (Cleary Tr. 488), arranged the monthly luncheon meetings for the Bank's board of directors, trust committee and loan committee (Cleary Tr. 488-9), acted as the public relations publicity director for the New Rochelle Kiwanis Club (Cleary Tr. 493), appeared at civic functions for the Bank two or three nights per week (Cleary Tr. 495), attended new branch openings for the Bank (Cleary Tr. 496), handled vendors for various giveaway items (Cleary Tr. 491, 499), and worked on projects for his immediate superior, Mr. Edward Flanagan, whenever directed (Cleary Tr. 500, 480). Cleary also made a number of new business calls for the Bank during this period which resulted in the bringing of $6,000,000. in March of Dimes deposits into the Bank (Cleary Tr. 494).

Cleary's immediate supervisor was Edward C. Flanagan (Cleary Tr. 480). As assistant manager of the branch, Cleary conceived his function "to be a buffer between Mr. Flanagan and the rest of the branch in order to make sure the work flow went smoothly."(Cleary Tr. 498). Cleary took care of operational

problems such as the tellers, safe deposits, savings bond desk, installment loan representative, new accounts desk and the supply room downstairs (Cleary Tr. 496-7). Cleary did salary reviews for clerical personnel (Cleary Tr. 497), reviewed mortgage applications for the Bank (Ibid.), and arranged schedules for night work and overtime for Bank personnel (Cleary Tr. 498).

As of July 1975, Cleary's credit line for Barclay's was $5,000 unsecured and $10-15,000 secured.

> "$5,000 unsecured means that it is within my judgment to grant a loan for $5,000 without any collateral security and grant a loan for 10 or 15 thousand secured by collateral, marketable securities, pass-book, treasury bills, bonds, whatever is a marketable security." Cleary Tr. 500.

The time Cleary spent on loan applications was "very nominal" (Cleary Tr. 504).

Edward C. Flanagan, the Bank's Vice President and Senior Regional Loan Officer (Flanagan Tr. 17), was Cleary's direct supervisor (Flanagan Tr. 48) and sat three desks away from Cleary (Flanagan Tr. 48-49). Flanagan identified two Bank manuals on loans but cautioned "I should stress that these manuals do not cover the assessment of credit." (Flanagan Tr. 46). Mr. Flanagan then continued as follows:

> "Q. What do you mean by assessment of credit?
>
> "A. Whether the loan officer should approve or decline the loan.

"Q. And what are the materials in writing with regard to assessment of credit at Barclay's Bank?

"A. Assessment of credit involves a lot of subjective judgment which comes over a period of time, and there is no manual for this as such, at least there wasn't at this time. There is now which goes -- the loan officer's guide has certain sections along those lines now, but that was not in effect in the fall of 1975.

"Q. And how does one learn about the subjective standards to be applied in assessing a loan at the bank? What are the procedures?

"A. By working with someone who has loan authority and seeing how he reaches his decisions, possibly by going and taking courses at the American Institute of Banking. It is something that is gained over a period of time.
"As I say there is a lot of subjective judgment and you have to learn how to exercise that subjective judgment." (Flanagan Tr. 46-47).

Flanagan was recalled by the Government "to ask him a specific question that I [the prosecutor] forgot to ask yesterday." (Tr. 167-168).

"Q. Mr. Flanagan, in evaluating whether or not to give a loan, what criteria should a bank employee use in deciding whether or not to approve a loan?

"A. The most important criteria would be the ability of the prospective borrower to repay the loan, which the loan officer must evaluate before he makes a decision.*

---

* Mr. Cleary at a later point testified as follows:
"Q. What was your understanding of the standards to be followed by you in exercising your discretionary authority?
"A. My standards?
"Q. Yes.
"A. Ability to repay." (Cleary Tr. 503).

"Another factor would be what assets does the prospective borrower have in the event his income was not sufficient for one reason or another to make the payments or repay the loan, does he have assets he can fall back on to liquidate and repay the loan.

"Another factor is how much outstanding debt does he have in addition to the loan he is now applying for. Someone might apply for a $5,000. loan and have no other debt and be granted the loan. Under the same set of circumstances, if he had three other loans outstanding, for the sake of argument, totalling $10,000., it might well be in the judgment of the bank his income would not be sufficient for him to carry those loans and the loan would be declined.

"Naturally, the honesty and integrity of the prospective borrower is also an important factor. All of these things must be evaluated by the loan officer before reaching his decision." (Flanagan Tr. 171-172).

The proof showed that Flanagan had 26 years experience (Flanagan Tr. 13) and Cleary but four months (Flanagan Tr. 14).

The Indictment charged Cleary with misapplication in the granting of ten unsecured loans. Each loan was for $5,000.00 which was within Cleary's discretionary authority (Flanagan Tr. 14; Cleary Tr. 500). Cleary was convicted on four of those loans:

COUNT	DATE	BORROWER	AMOUNT
6	11/13/75	Guiseppe (Joseph) Passarelli	$5,000.00
7	11/25/75	Thomas Powers	$5,000.00

COUNT	DATE	BORROWER	AMOUNT
8	12/15/75	Westchester Avenue Used Cars, Inc.	$5,000.00
14	12/9/75	Edward R. Hogan	$5,000.00

The Government proof showed that Cleary did not meet any of the individual borrowers. Instead, he relied upon written and oral statements submitted by the cooperating defendant, the attorney Healy (Cleary Tr. 599). Although it was "normal procedure" to interview the borrower (Flanagan Tr. 18), Flanagan did not testify that a personal interview was mandatory, nor was Cleary told that a personal interview of the borrower was required (Cleary Tr. 597). The Passarelli loan, the Hogan loan and the corporate loan were each reviewed and initialed by Flanagan (Flanagan Tr. 184-185; Government Exhibits 21, 27, 33). The Powers loan was an instalment loan which was subjected to a credit check and reviewed in regular course by the Bank's Instalment Loan Department (Savoca Tr. 408, 409). The Hogan and corporate loan applications were not in writing, but the Bank rules did not require that such commercial loan applications be in writing (Rabasca Tr. 618-619). Although the Government argued that since the three corporations were each controlled by the defendant Gustavo Passarelli, the loans in the aggregate exceeded Cleary's $5,000 limit, again Julia Rabasca, a Bank employee since 1961, testified that loans

to multiple corporations each owned by the same individual did not violate the Bank rules (Rabasca Tr. 618).

There was no evidence that Cleary received kickbacks, bribes or any other favors for making the loans. Cleary flatly denied receiving any money or favors (Cleary Tr. 563). Cleary did not even meet the defendant Gustavo Passarelli until after the series of loans were called in question by the Bank (Cleary Tr. 559; Passarelli Tr. 699). In the light of Cleary's failure to profit personally, the Court conceded this fact situation to be "a very baffling episode." (Tr. 463-464). Throughout, Cleary had relied upon the cooperating defendant Healy (Cleary Tr. 507), who was still a member of the bar at the time of the events in question and even while testifying at the trial (Healy Tr. 90), although he had been convicted of bank embezzlement in August 1975 and sentenced on October 31, 1975, in the midst of the events charged in the Indictment (Healy Tr. 91). Healy conceded that he had attempted to assure Cleary that he was acting properly in making the loans throughout the period at issue:

> "Q. Did you tell Mr. Cleary at any time during the time that you were getting these loans from him that he was making a mistake in making you a loan?
>
> "A. No, I did not.
>
> "Q. Or in making a loan for any of your clients?
>
> "A. No.

"Q. And everything you could you tried to reassure him he was acting properly in making these loans, is that correct?

"A. Yes.

"Q. And it was very important to you to reassure him, wasn't it?

"A. I reassured him.

"It was important to me to obtain loans, yes." (Healy Tr. 229).

Cleary's defense was in two parts. The first argued that the substantive crime of misapplication had not been made out since the prosecution did not show that any Bank standards governing the approval of loans had been violated by the defendant (Tr. 448; see Tr. 817, 828). The second argued that the proof showed no intent by Cleary to injure or defraud the Bank. On the second point, the array of activities performed by Cleary was relevant.

The Court's charge on intent to injure or defraud the Bank read that element out of the case and was plain error. Request No. 11 submitted by the Government stated:

"*** the Government must prove beyond a reasonable doubt that the defendant acted with an intent and knowledge that the bank was being placed in jeopardy of loss and with intent to injure or defraud the bank and not merely because of mistake or inadvertance or some other innocent reason."

Defense counsel objected to this language at the in camera session before the charge was given:

> "MR. MURPHY: ***
> "This language in general that the bank was being placed in jeopardy of loss, that is intrinsic to any loan. It is too simplistic to be a definition of this, especially in the light of the cases I have cited and the language I have cited. That is as to No. 11.
>
> "MR. WEINBERG: Should I comment, your Honor?
>
> "THE COURT: No.
> 'I think actually, Mr. Murphy, it is a waste of time. I think you are going to have ample opportunity. You should wait and hear my charge and then you will be in a position to make more concrete objections.
>
> "MR. MURPHY: Your Honor, the purpose for my making objections now is because the Court's charge is very important to me both in the summation and for the jury. I do not want it to be corrected after you get [give] it. I would much rather that your Honor gives it taking into consideration whatever I have to say beforehand and rather than a long list of objections thereafter because I really don't think that objection does anywhere as much good as an objection at the right time. I ask you to take into consideration what I have offered.
>
> "****" (Tr. 733-734).

The Court then gave the following charge on the element of intent

to injure or defraud:

> "Even if it was not Mr. Cleary's purpose to injure or defraud Barclay's Bank, if he knew that the natural effect of his actions would be to expose the bank to loss, injury or fraud, the requisite intent is established. In deciding the defendant Cleary's intent, you must consider all the facts and circumstances of the case." (Tr. 884).

Defense counsel objected to that specific portion of the charge, but the Court left the charge unchanged:

> "MR. MURPHY: I have two objections and one comment, your Honor.
> "My objections are to the Pinkerton charge, which I made previously, and you stated in the course of your misapplication definition that exposure to loss is sufficient.
> "I had a problem with exposure to loss, because in any loan there is obviously an exposure to loss, and to that extent I would object to that portion of it.
>
> "THE COURT: I said intentional exposure to loss, I think that is entirely different. In the abstract you are right. In any event, I am not changing it." (Tr. 901).

The Court's refusal to amend its charge after the objection was plain error.

By memorandum filed January 27, 1977, Cleary moved for a directed verdict of acquittal on the ground that judged by the due process test of the Fifth Amendment there was no evidentiary

basis to support Cleary's conviction. The Court denied Cleary's motion by memorandum endorsed on February 15, 1977 (Cleary Appendix, p. 10A). Cleary was sentenced on February 24, 1977. His notice of appeal was filed March 2, 1977.

Applicable Statute

> "Whoever, being an officer *** of *** any *** insured bank, *** wilfully misapplies any of the monies *** of such bank [shall be guilty of a crime]." 18 U.S.C. §656.

ARGUMENT

POINT ONE

PROOF THAT A BANK OFFICER MADE INDIVIDUAL LOANS EACH IN AMOUNTS WITHIN HIS DISCRETION AND APPROVED BY HIS SUPERIOR AND NONE IN VIOLATION OF WRITTEN OR ORAL RULES OF HIS BANK DOES NOT MAKE OUT MISAPPLICATION IN VIOLATION OF 18 U.S.C. §656

The defendant Cleary was convicted in four counts that he did "wilfully and knowingly abstract and misapply the moneys" of the Barclay's Bank of New York in violation of 18 U.S.C. § 656 and in one count of conspiring to violate that section. It is conceded that Cleary was an officer of the Bank (Flanagan Tr. 41; Cleary Tr. 482-483) and that the deposits of the Bank were insured by the Federal Deposit Insurance Corporation (Tr. 370). The Court did not charge the jury on the verb "abstract" (see Tr. 848, at

Tr. 880-884) but instead limited its charge to the verb "misapply." The issue then is whether the evidence that Cleary "did misapply" the funds of the Bank will withstand the Due Process test of the Fifth Amendment.

It is conceded that each of the four loans on which Cleary was convicted was within Cleary's dollar-amount discretion. The Government argued that the essence of Cleary's wrong was in approving loans to a series of named borrowers when he knew the proceeds were going to a third person, the defendant Passarelli (Opening Tr. 2, 5, 6, 7, 8; Summation Tr. 842, 844). However, it is no offense that the defendant Passarelli was the ultimate recipient of the loan proceeds to Cleary's knowledge so long as the intermediate borrower was a financially capable person. United States v. Gens, 493 F.2d 216, 221-222 (1st Cir. 1974); see Court's Charge at Tr. 882-883. The loan documents were good on their face. Where there was no application submitted, none was required by the Bank. And Cleary received no part of the loan proceeds. Giragosian v. United States, 349 F.2d 166, 169 (1st Cir. 1965), holds that a bank officer who received no part of the loan proceeds may not be convicted of misapplication for failure to investigate loan applications proper on their face.

Although the Second Circuit has held that mere knowledge

that the challenged transactions violated a bank rule would not suffice to support a conviction for aiding and abetting under §656, United States v. Docherty, 468 F.2d 989, 993 (2d Cir. 1972), here there is no proof that any Bank rule was violated by Cleary. This case challenges Cleary's assessment of credit in granting these loans, but the Bank had no written rules on the assessment of credit (Flanagan Tr. 46-47). Even its oral rules were fuzzy in stating the prohibitions which the Government now seeks to enforce with all the majesty of the criminal process. Interviews of the putative borrowers were not a requirement but rather the "normal procedure" (Flanagan Tr. 18). Loans to a series of corporations controlled by a single individual were within a bank officer's discretion (Rabasca Tr. 618); commercial loan applications need not be in writing (Rabasca Tr. 618-619). Cleary himself did not believe there was anything wrong with the loans (Cleary Tr. 607; see Cleary Tr. 597). And each loan was approved by his superior.

It is hornbook law that Cleary may not be convicted for mere "negligence in the handling of the bank's affairs." United States v. Williams, 478 F.2d 369, 373 (4th Cir. 1973). As the Court said in Giragosian, so we say here: "To be sure, [Cleary] may have acted irregularly or improperly [citation omitted], or

he may have acted incautiously [citation omitted], or he may have used bad judgment in making the loans [citation omitted]; but such action does not rise to criminal dimensions." 349 F.2d at 169. If one may not be convicted for mere negligence, what is left as the evidentiary support for the conviction here? We respectfully submit that there is no evidentiary basis and a directed verdict of acquittal must issue. See Thompson v. Lousiville, 362 U.S. 199, 201-202, 80 S.Ct. 624 (1960) ("Shufflin' Sam" case: Loitering conviction reversed where the manager testified that he did not at any time during petitioner's stay in the cafe object to anything petitioner was doing and had never told petitioner he was unwelcome there).

It is elemental due process that there be fair notice that conduct may entail punishment. 18 U.S.C. §656 interdicts "misapplication" which has been defined to occur "when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made for his own benefit, concealing his interest from the bank." United States v. Fortunato, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933, 89 S.Ct. 1205 (1969). A second definition is that "when a subordinate officer makes an unauthorized loan, he misapplies the funds of the bank." United States v. Giordano, 489 F.2d 327, 331 (2d Cir. 1973). But neither definition will stretch to cover the facts adduced at trial here.

May a lesser standard of conduct form the basis for the criminal proscription? On these facts, the answer must be in the negative. The Constitutional Due Process "test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Jordan v. DeGeorge, 341 U.S. 223, 231-232, 71 S.Ct. 703 (1951). At bottom, the Government's proof shows no more than Cleary's good faith exercise of bad judgment. To show that much but no more is to prove too little.

Analysis of the appellate cases which have weighed the sufficiency of the evidence in the "troublesome" area of §656* shows that the rosetta stone is the presence of absence of personal gain to the defendant. United States v. Docherty, 468 F.2d 989 (2d Cir. 1972)(conviction reversed where no personal gain); United States v. Tokoph, 514 F.2d 597 (10th Cir. 1975) (conviction affirmed where kickback); Giragosian v. United States, 349 F.2d 166 (1st Cir. 1965)(conviction reversed where no personal gain); United States v. Matot, 146 F.2d 197 (2d Cir. 1944) (conviction reversed in "curious" and "totally inexplicable" case where no personal gain); United States v. Cades, 495 F.2d 1166 (3d Cir. 1974)(conviction reversed where no personal gain). In

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* United States v. Giordano, 489 F.2d 327, 330 (2d Cir. 1973).

United States v. Giordano, 489 F.2d 327, 330 (2d Cir. 1973), the conviction was affirmed although there was no proof that the bank officers were paid to commit violations; in Giordano the officer deposited checks as cash to mislead the bank in a check kiting scheme where the amount owed to the Bank exceeded $880,000. But Giordano is that exceptional case which proves the rule; the instant case is not. Cleary received no part of the loan proceeds.

The conviction of Cleary on the conspiracy count "cannot survive unless there was sufficient evidence to show the violation of §656 charged in it." United States v. Docherty, 468 F.2d 989, 992 (2d Cir. 1972).

POINT TWO

THE COURT ERRED IN SUBSTITUTING EXPOSURE TO LOSS FOR INTENT TO INJURE OR DEFRAUD IN ITS CHARGE ON 18 U.S.C. §656.

It is a judicial truism that under 18 U.S.C. §656 an intent to injure or defraud the bank is an essential element of the offense. United States v. Giordano, 489 F.2d 327, 330, 333 (2d Cir. 1973). In Giordano, Judge Dooling had charged that if either

> "or both of them knew that such application of the bank funds exposed it to the risk of losing the funds so applied and concealed the existence of the transaction by crediting uncollected Bay Auto Sales checks to the Giordano and Baywood Stables accounts in

such a way that they appeared to be deposits of currency and not deposits of uncollected checks [then the requisite intent was made out]." 489 F.2d at 333.

The Second Circuit upheld the charge even though the words "intent to injure or defraud the bank" did not appear on the ground that the combination of knowledge of exposure to loss plus concealment was sufficient.

> "We think that the combination of elements in the instruction (1) that the bank officers knew that the misapplication exposed the bank to the risk of losing its funds and (2) that they concealed the misapplication, sufficiently explicates the intent required." 489 F.2d at 333.

Judge Carter's charge here is far different.

> "If you should find that William Cleary wilfully misapplied monies, funds or credits of Barclay's Bank, you must then consider whether he acted with an intent to injure or defraud the bank. For each count in which the defendant is charged with the misapplication of funds, the government must prove beyond a reasonable doubt that the defendant acted with an intent and knowledge that the bank would be injured or defrauded. Intent to injure or defraud does not mean malice or ill will. It means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing financial loss to another, or bringing about some financial gain to one's self.
>
> "Even if it was not Mr. Cleary's purpose to injure or defraud Barclay's Bank, if

> he knew that the natural effect of his actions was to expose the bank to loss, injury or fraud, the requisite intent is established. In deciding the question of defendant Cleary's intent, you must consider all the facts and circumstances of the case." (Tr. 883-884).

What the first paragraph gave, the second paragraph has taken away. And the element taken away is the intent to injure or defraud.* Since that element is an essential element of the offense, its removal is error which compels the reversal of the defendant's conviction of misapplying monies in violation of 18 U.S.C. §656. See United States v. Arthur, 544 F.2d 730, 736-737 (4th Cir. 1976). Since an objection was lodged both before and after the charge, the error is preserved (Tr. 733, 901). Even if it were not preserved, to read out the intent to injure or defraud language is to commit plain error.

CONCLUSION

Cleary's judgment of conviction should be reversed and the Indictment dismissed.

Dated: New York, New York,
June 3, 1977

Respectfully submitted,

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* To replace it with a recital that exposure to loss is sufficient is patently inadequate since in the granting of any loan there is obviously an exposure to loss. See Tr. 901.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 77-1107

UNITED STATES OF AMERICA,
Appellee
~~Plaintiff~~

against

WILLIAM H. CLEARY and
GUSTAVO PASSARELLI,
Defendants-Appellants.
~~Defendant~~

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ***ss.:***

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 335 East 22nd Street, New York, New York.

That on June 3, *19*77 *deponent served the annexed* Brief

of Defendant-Appellant William H. CLeary
on Morton Berger, Esq.
attorney(s) for Defendant-Appellant Gustavo Passarelli
in this action at 13 Eastbourne Drive, Spring Valley, New York 10977
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this 3rd day of June, 1977.

Patricia Dennigan
Notary Public

PATRICIA DENNIGAN
Notary Public, State of New York
No. 24-4618654
Qualified in Kings County
Commission Expires March 30, 1979

Sylvia Diop
The name signed must be printed beneath
Sylvia Diop

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

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Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

Copy Received
Richard Weintraub
AUSA
6/3/77